Pillsbury Chemical & Oil Company and MSR Trucking Company, Single Employers *and* Douglas Evanoff *and* Local 299, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–28730, 7–CA–28836, and 7–CA–28737

April 28, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 28, 1990, Administrative Law Judge Russell M. King issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a response.

On November 6, 1991, the Board remanded the proceeding to the judge for further consideration regarding certain 8(a)(3) and (4) allegations of the complaint and for issuance of a supplemental decision. The Board deferred consideration of the remaining complaint allegations pending the judge's supplemental decision.

On June 30, 1993, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order.

1. The judge found that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by demoting employee Douglas Evanoff and Section 8(a)(1) and (3) by constructively discharging Evanoff[2] and laying off employee Otis Nicholes. In finding that the Nicholes layoff violated Section 8(a)(3), the judge reasoned that Nicholes was laid off not because of his own support of the Union, but to validate the Respondent's discipline of Evanoff. That is, the Respondent laid off Nicholes to lend an ''aura of legitimacy'' to the Evanoff demotion. The General Counsel excepts to the judge's failure to find that the Respondent's actions vis-a-vis Evanoff and Nicholes also violated Section 8(a)(4) on the same basis.

We find merit in the General Counsel's exception. The animus directed at Evanoff stemmed from both his union support and his having furnished affidavits in an unfair labor practice proceeding that arose in the context of the organizing campaign. In addition, the judge found that the demotion of Evanoff violated Section 8(a)(4). In these circumstances, we conclude that the constructive discharge of Evanoff, premised in part on the demotion, violated Section 8(a)(4).

In addition, because the layoff of Nicholes was part of the scheme to mask the 8(a)(3) and (4) actions taken against Evanoff, we conclude that the layoff of Nicholes violated not only Section 8(a)(3) but Section 8(a)(4) as well. We have modified the Order and notice accordingly.

2. The General Counsel excepts to the judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(1) and (5) by refusing to bargain collectively with the Union concerning the Nicholes layoff and Evanoff demotion. The judge found that the Respondent notified Evanoff and the two stewards at the Respondent's facility immediately after making its decisions. The judge also noted that other alternatives were discussed, and that the Union failed to request further bargaining about these matters. We find merit in the General Counsel's exception.

The record shows that, after the Respondent decided that it intended to lay off Nicholes and demote Evanoff, it went directly to one of the affected employees, Evanoff, and informed him first. Evanoff then related that information to the union stewards, one of whom sought out management officials to confirm what Evanoff had told him. Although there is conflicting testimony on whether alternatives to these actions were explored,[3] it is undisputed that the Respondent proposed no alternatives itself and that it had already informed Evanoff of its decision before any discussion with the Union had taken place. In these circumstances, it is clear that the Respondent did not give notice to the Union of its decision and afford the

[1] In adopting the judge's finding that Sam Nowlin is a supervisor within the meaning of Sec. 2(11) of the Act, we note that the judge found that Nowlin not only possessed and exercised authority to assign work to Charging Party Evanoff but also effectively to recommend pay increases. Thus, on both occasions that Nowlin participated in Douglas Evanoff's annual evaluation, he recommended, and Evanoff subsequently received, pay increases.

[2] The Respondent excepts to the judge's finding that Evanoff was constructively discharged. It asserts that the General Counsel has not met his burden of showing that the change in Evanoff's working conditions in retaliation for union activity has rendered those conditions so difficult or unpleasant that it forced him to resign. We disagree with the Respondent's contention. The General Counsel met his burden by establishing the demotion and the substantial reduction in Evanoff's base pay. See, e.g., *Superior Forwarding Co.*, 282 NLRB 806 (1987) (imposition of a 60-percent increase in fuel costs so distorted discriminatee's terms and conditions of employment as to render them intolerable); *Holiday Inn of Santa Maria*, 259 NLRB 649 (1981) (quit after a reduction of pay from $4.33 to $3.60/hr. found to be a constructive discharge). Individual circumstances, such as Evanoff's testimony that his cut in pay could force him into foreclosure of his recent home purchase (of which the Respondent was aware), are also relevant. See, e.g., *American Licorice Co.*, 299 NLRB 145, 148 (1990) (child care burdens affected discriminatee's availability for shift change); *St. Joseph's Hospital*, 247 NLRB 869, 873, 880 (1980) (refusal to grant a request for change of hours to attend college).

[3] Alternate Union Steward Holly testified that he asked the Respondent's executive vice president, H. R. Vahle, whether Nicholes could work part time. Vahle denied that any alternatives were raised.

Union an opportunity to bargain over that decision and its effects. The Union acquired knowledge of the layoff and demotion only after the fact. The Respondent's unilateral action therefore violated Section 8(a)(1) and (5) of the Act. See *Plastonics, Inc.*, 312 NLRB 1045, 1048 (1993).[4]

ORDER

The Respondent, Pillsbury Chemical & Oil Company and MSR Trucking Company, Single Employers, of Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its employees to validate, vindicate, or to provide an aura of legitimacy to the demotion of other employees because of their union support or activities or because they testified in proceedings before the Board.

(b) Demoting employees and causing them to terminate their employment because of their union sympathies, support, or activities, or because they testified in proceedings before the Board.

(c) Laying off or demoting employees without affording Local 283, International Brotherhood of Teamsters, AFL–CIO[5] notice and an opportunity to bargain over these decisions and their effects.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Otis Nicholes immediate and full reinstatement to his former janitor job in the maintenance department which he held before December 9, 1988, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of the administrative law judge's supplemental decision.

(b) Offer Douglas Evanoff immediate and full reinstatement to his former job in the maintenance department which he held prior to December 9, 1988, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of the administrative law judge's supplemental decision.

(c) Remove from its files any reference to the unlawful layoff of Otis Nicholes, and to the unlawful demotion and resignation of Douglas Evanoff, and notify them in writing that this has been done and that the layoffs, demotion, and resignation will not be used against them in any way.

(d) On request bargain with Local 283, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative for unit employees, concerning the decision to demote and lay off employees on December 9, 1988, and the effects of that decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its office and plant in Detroit, Michigan, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] In view of the finding that the Nicholes layoff and the Evanoff demotion violated Sec. 8(a)(3) and (4), Member Cohen does not pass on the 8(a)(5) allegations, as any such additional violations would not substanially affect the remedy.

[5] There is no exception to the judge's finding that, as of May 8, 1989, Local 299 no longer represented the Respondent's employees and that Local 283 became the exclusive bargaining representative for the unit. Accordingly, we shall order the Respondent to bargain with Local 283.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off our employees in order to validate, vindicate, or provide an aura of legitimacy to the unlawful demotion of other employees because of their union activities or support or because they provide testimony before the Board.

WE WILL NOT demote our employees, or cause their departure, because of their union sympathies, support, or activities, or because they provide testimony before the Board.

WE WILL NOT lay off or demote employees without affording Local 283, International Brotherhood of Teamsters, AFL–CIO notice and an opportunity to bargain over those actions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Otis Nicholes immediate and full reinstatement to his former job and WE WILL make him whole, with interest, for any wages and benefits lost as a result of our having laid him off on December 9, 1988.

WE WILL offer Douglas Evanoff immediate and full reinstatement to his former job and WE WILL make him whole, with interest, for any wages and benefits he lost as a result of our having demoted him on December 9, 1988, and unlawfully causing him to resign on or about January 20, 1989.

WE WILL remove from our files all references to the layoff of Otis Nicholes and the demotion and resignation of Douglas Evanoff, and WE WILL notify them in writing that this has been done and that the layoff, demotion, or resignation shall not be used against them in any way.

WE WILL bargain in good faith with Local 283, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative for unit employees, concerning the decision to demote and lay off employees on December 9, 1988, and the effects of that decision.

PILLSBURY CHEMICAL & OIL COMPANY AND MSR TRUCKING COMPANY, SINGLE EMPLOYERS

Michael R. Blum, Esq., for the General Counsel.
A. Read Cone III, Esq. and *Eric J. Henning, Esq. (Dean & Fulkerson, P.C.)*, of Birmingham, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. These consolidated cases were heard by me on June 26 and 27, 1989, in Detroit, Michigan. The first (and original) charge in Case 7–CA–28730 was filed by the individual Charging Party Douglas Evanoff on December 15, 1988. The charge in Case 7–CA–28737 was filed by Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) on December 19, 1988, and the charge in Case 7–CA–28836 was filed by the individual Charging Party Evanoff on January 24, 1989.[1] Based on the charges, a consolidated complaint was issued on May 9, 1989, by the Regional Director for Region 7 of the National Labor Relations Board (the Board), on behalf of the Board's General Counsel.[2] The complaint alleges that Pillsbury Chemical & Oil Company and MSR Trucking Company (the Company[3]) unlawfully demoted employee Douglas Evanoff and unlawfully laid off employee Otis Nicholes, in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The complaint also alleges that the demotion and layoff were unilateral on the part of the Company, and thus violative of Section 8(a)(5) of the Act. Finally, the complaint alleges the constructive discharge of employee Douglas Evanoff also in violation of Section 8(a) (1), (3), and (4) of the Act.[4] The Company defends the demotion, layoff, and discharge by alleging that they were only and solely for economic reasons and not based on any union or protected activity on the part of the two employees involved. The Company also alleges that it notified and discussed the matter with the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and counsel for the Company, I make the following

[1] Dates in January are in 1989 unless otherwise noted, and all other dates are in 1988 unless otherwise noted.

[2] The term ''General Counsel,'' when used, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board through the Regional Director.

[3] The complaint alleges, and it is admitted, that both Companies are affiliated businesses, thus throughout this decision they will be treated as one business enterprise, designated by the term ''Company.''

[4] The pertinent parts of the Act (29 U.S.C. § 151 et seq.) read as follows:

> Sec. 8(a) . . . It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act;
>
> (5) to refuse to bargain collectively with the representative of employees . . . .
>
> . . . .
>
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

FINDINGS OF FACT[5]

I. JURISDICTION AND THE LABOR ORGANIZATION

The pleadings, admissions, and evidence in the case establish the following jurisdictional facts. At all times material, the Company (both Pillsbury and MSR Trucking) has maintained its principal office and place of business in the city of Detroit, Michigan, where it has engaged in the manufacture, sale, and distribution of industrial chemicals, lubricants, and related products. Regarding these products, MSR Trucking has engaged in the transportation of the same in interstate commerce. During the year ending August 31, 1988, a representative period, Pillsbury's gross volume of business exceeded $1 million. During the same period, Pillsbury, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its Detroit facility chemicals, oils, and other goods and materials valued in excess of $50,000, the goods and materials having been transported and delivered to the Detroit facility directly from points located outside the State of Michigan. During the calendar year ending December 31, 1988, MSR Trucking, in the course and conduct of its business operations within Michigan, derived gross revenues in excess of $50,000 for the transportation of freight and commodities in interstate commerce pursuant to arrangements with and as agent for Pillsbury. The gross revenues of MSR Trucking were received as a result of the transporting of products manufactured by Pillsbury to various States throughout the United States. Thus, I find, as admitted, that Pillsbury and MSR Trucking, both Michigan corporations, have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Also, as admitted, and at all times material, Pillsbury and MSR Trucking have been affiliated business enterprises with common officers, ownership, directors, management, and supervision. They have also formulated and administered a common labor policy affecting employees of their operations, have shared common premises and facilities, provided services for and made sales to each other, have interchanged personnel with each other, and have held themselves out to the public as a single integrated business enterprise. Thus, I find and conclude that Pillsbury and MSR Trucking constitute a single integrated business enterprise and a single employer within the meaning of Section 2(5) of the Act.

Also, as alleged and admitted, I find that the Charging Union has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[5] The facts found are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Regarding those testifing in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Brief History*

Sometime in early or mid-1988, the Union commenced an organizational drive at the Company. The unit involved was the Company's production and maintenance employees, together with its truckdrivers. Employee Evanoff signed a union authorization card and supported the Union. Evanoff had worked for the Company for several years as a maintenance employee. Much of this time he had worked with (or under) employee Samuel M. Nowlin, who was senior to Evanoff.[6] Nowlin became ill about December 7, 1987, and left the Company on medical leave, returning on December 5, 1988. During this time, Evanoff continued his duties of maintenance employee, together with employee Otis Nicholes, who was a janitor. Also during this period of time, with some periodic exceptions, Evanoff and Nicholes were the only maintenance employees at the Company. At some point in the union organizational drive, the Union filed unfair labor practice charges, and thereafter the Regional Director issued a complaint as a result of these charges. The Union's organizational drive culminated in the filing of petitions for representation with the Board (Cases 7–RC–18683 and 7–RC–18700). A Board-conducted election was held August 26 and out of 22 eligible voters, 10 votes were in favor of the Petitioning Union, 1 against, and 11 of the ballots were challenged. On September 2, objections to the conduct of the election were filed by the Company. On September 23, the Regional Director issued his Report on Determinative Challenges and Objections to the Election and consolidated this case with the pending unfair labor practice complaint. By virtue of certain actions and activities of the Company during and after the election, a U.S. district court entered a restraining order on September 28. About October 25, the Company and the Union settled all of their differences in both the representation cases and the unfair labor practice case and pursuant to that settlement, on October 28, the Regional Director issued his Report and Recommendation on Challenged Ballots and Objections. Employee Evanoff was a potential witness in the unfair labor practice case and gave an affidavit in the district court injunction case. The settlement entered into by the parties about October 25 was a formal Board settlement, and pursuant thereto the Board issued its Decision and Certification of Representative on November 29, 1988, in which it certified the Union as the collective-bargaining representative for the Company's employees in the unit described earlier.[7] On employee Nowlin's return to work after his year-long illness, janitor Nicholes was laid off and employee Evanoff was placed in Nicholes' job as janitor. The Company contends that Evanoff's ''demotion'' was necessary by virtue of the return of Nowlin, who was considerably senior to Evanoff in time of employment. Evanoff then commenced to look for other employment and eventually accepted another position and left the Company. The General Counsel alleges that employee (janitor) Nicholes was laid off to facilitate Evanoff's demotion and ''to give an air of legitimacy'' to Evanoff's demotion, thus violative of Section

[6] At issue in the case is whether or not employee Nowlin was a supervisor as defined by the Act.

[7] The U.S. district court restraining order (or injunction) was dissolved February 10, 1989.

8(a)(1) and (3) of the Act. The General Counsel also alleges that Evanoff's own demotion also violated Section 8(a)(1), (3), and (4) of the Act, and that his subsequent departure from the Company for another job was a constructive discharge, in violation of Section 8(a)(1), (3), and (4) of the Act. Finally, the General Counsel alleges that the Company violated Section 8(a)(1) and (5) of the Act by failing to first bargain with the Union regarding the layoff of Nicholes and the demotion of Evanoff. The Company defends on the grounds that the layoff of Nicholes and the demotion of Evanoff as a result of business necessity, and that the Union was adequately notified of the decision and did in fact comment on the same. The Company argues that Evanoff was not actually demoted, but exercised his right to ''bump'' Nicholes, and that after this took place, Evanoff voluntarily quit the Company.

B. *The Testimony and Evidence*

Former employee Douglas Evanoff worked for the Company for 5 years. He was hired on January 6, 1984, and left the Company on January 20, 1989. Evanoff testified that when he was hired in 1984, he was first interviewed by Plant Manager Bud Bushor and by Sam Nowlin, who identified himself as the maintenance supervisor.[8] Evanoff indicated that he was hired as a maintenance man and that his immediate supervisor was Sam Nowlin. According to Evanoff, he reported to Nowlin up until Nowlin's leave of absence by virtue of illness, which commenced on December 7, 1987. Evanoff testified that up until then, he worked with Nowlin who gave him job assignments. Evanoff indicated that he periodically purchased needed parts after receiving permission to do so from either Plant Manager Bushor or Nowlin. Evanoff testified that his initial pay was $5.50 an hour, but that he did receive raises after Nowlin would recommend merit increases for him, sometimes orally or sometimes in writing. Evanoff added that Nowlin would periodically perform work evaluations on him.[9]

Evanoff testified that prior to Nowlin's sick leave (December 1987) that Nowlin and Alan Ferry constituted the maintenance department, although Ferry was a janitor. Evanoff related that he and Nowlin would fix machines, do pipefitting and welding work, install boilers, and perform cement work. In contrast, Evanoff indicated that the janitor would do such things as sweep, empty trash, mop, and scrape floors. Evanoff added that prior to Nowlin's sick leave, Mike Manucuso also worked as a janitor, and that in December 1987, when Nowlin went on sick leave, the Company hired Joe Walowich to assist Evanoff as a maintenance helper. Evanoff testified that after Nowlin went on sick leave Consulting Engineer Jim Acker would occasionally help him when installing equipment. Nowlin returned to work on December 5 and, according to Evanoff, he was slow and very weak, and on occasion Evanoff would finally finish jobs that Nowlin had started. Evanoff testified that on December 9, Vice President Harris R. Vahle called him into his office and told him he was demoted to the job of janitor, as the Company no longer needed two men in the maintenance department. Evanoff indicated that he left Vahle's office and told Acting Union Steward David Holly what had happened, whereupon he and Holly returned to Vahle's office. According to Evanoff, Holly then asked Vahle if he had notified the Union before demoting Evanoff, to which Vahle replied that he had not, but further indicated that if Union Business Agent Don Smith could find a better way of resolving the situation, Smith should give him a call. Evanoff testified that he then told Vahle that he ''was going down to the NLRB to give an affidavit.'' Evanoff related that Vahle then said that ''he would not do that if I was him.'' Evanoff then testified that he, Holly, and Otis Nicholes went down to the union hall and told Business Agent Don Smith about the demotion.[10] According to Evanoff, after he was demoted and took over Nicholes' janitorial job, Nowlin continued to perform maintenance duties but had problems with operating a newly installed boiler and did not have a license to operate this boiler as Evanoff did. Evanoff added that there were some other maintenance duties that Nowlin failed to do, and which were ultimately performed by outside contractors, adding that other maintenance work involved at least two individuals. Evanoff related that during his employment with the Company he received both annual raises and merit increases in pay.

Regarding the Union, Evanoff identified his union authorization card that he signed on June 14, 1988. Evanoff testified that during a telephone conversation on June 20, Plant Manager Bushor stated that he had union problems. Evanoff further testified that later that same day he went to pick up his paycheck (which included an unexpected raise), and at that time Bushor asked him if he knew anything about the Union, to which he replied, untruthfully, that he did not. The election occurred on August 6 and Evanoff testified that he did vote in the election, but that 15 minutes prior thereto, he had a conversation with Company President Robert Rauth, who asked him, ''[I]f I knew what I was doing before I went in there . . . [to vote].'' Evanoff testified that later, and sometime in September, Rauth asked him, ''What happened to you, Doug?'' Evanoff indicated that he replied to Rauth that I voted the only ''No'' vote, to which Rauth replied that

[8] At the commencement of the hearing, the General Counsel amended the complaint to allege that Samuel M. Nowlin was maintenance supervisor and, accordingly, a supervisor as defined by the Act. The Company amended its answer to deny this allegation. The status of Nowlin is in issue in the case. Nowlin made several remarks to Evanoff that the Company alleges are hearsay and not admissible into evidence. The Company made a timely objection to these remarks on the record. I deferred a ruling on the Company's objection pending the entire testimony and evidence in the case. The ruling was deferred to be handled in this decision. Later in the case Nowlin did testify. The alleged hearsay statements will be contained in the summary of the testimony and evidence in the case and a final ruling will appear later in this decision.

[9] Three such evaluations were admitted into evidence. They were dated September 10, 1985, August 15, 1986, and September 1, 1987. Out of 13 individual categories, Evanoff was rated ''good'' in 3 categories and ''excellent'' in 10 categories on the 1985 performance report. In the 1986 and 1987 performance reports, Evanoff was rated ''excellent'' in all 13 categories. The bottom of the reports contained a signature block identified as ''supervisor's signature,'' and in that block, Nowlin's signature appeared on all three reports. Also on all three reports, under the block ''manager's signature,'' the signature of Plant Manager Bushor appears. Evanoff, himself, also signed all three reports.

[10] Prior to this time Otis Nicholes had been a janitor also, and Evanoff testified that at the same time he was demoted, Nicholes was laid off (on December 9).

he did not because the sole ''no vote'' was that of Bruce Neighbor. According to Evanoff, he then stated to Rauth that Rauth did not know that for sure, as the election was a secret-ballot election, to which Rauth replied that he did not believe him.[11] Evanoff testified that sometime later (after his demotion to the position of janitor) he asked Vahle why the Company had demoted him, to which Vahle responded that ''he didn't like liars.'' Evanoff indicated he then told Vahle he could not make it on a janitor's pay, to which Vahle made no response. Evanoff testified that several weeks after he had been demoted he had a telephone conversation with Nowlin and, according to Evanoff, Nowlin remarked that he could not believe the Company had done that to him because Vahle had told Nowlin that he had done such a good job when Nowlin was in the hospital. According to Evanoff, during this conversation Nowlin also told him that he learned that Bushor and Vahle had seen affidavits that Evanoff had given to the Board in a prior case and, according to Evanof, Nowlin also related to him that Vahle and Bushor had told Nowlin that Evanoff was demoted because he also voted for the Union.[12] Evanoff testified that when he was demoted he received a cut in pay from $9.75 an hour to $6.44 an hour, thus changing his weekly take-home pay by about $100. According to Evanoff, in January he took 5 days off to look for a better job. Evanoff related that he had purchased a house and that he was in fear of losing that house by virtue of his cut in pay. Evanoff testified that the Company knew the purpose of his leave, knew that he was looking for a new job and, on January 9, signed a letter of recommendation on behalf of Evanoff.[13] Evanoff testified that he did find another job and on January 20 he quit the Company.[14] Evanoff testified that during his years of employment with the Company he had never received any disciplinary action and had never been written up, although he was ''scolded'' by his ''boss'' two or three times for not doing a job the way that Nowlin told him to do it. Regarding his new job, after January 20, Evanoff testified that he was making more than he did as a janitor, but less than he was making as a maintenance employee with the Company, on a less desirable shift.

During cross-examination Evanoff indicated that prior to coming to work for the Company, he had worked for an automobile dealership and he conceded that he learned about maintenance from Sam Nowlin, whom he also conceded was a skilled maintenance worker. Evanoff indicated that during Nowlin's absence, he was helped on occasion by Joe Walowich, who also performed janitorial duties. According to Evanoff, Walowich had worked for the Company approximately 6 or 7 months and left the Company to return to school before Nowlin returned to work. Evanoff conceded that after Walowich left (shortly after the election in August), he was not replaced by another employee. Evanoff added that after Walowich left, he continued to perform all of the maintenance work himself but claimed he had trouble keeping up with the available work, further stating that it was more work than one man could handle. Evanoff conceded that prior to Nowlin's return, that he and janitor Otis Nicholes were the only two employees in the Company's maintenance department, and that Nowlin's seniority was far greater than his own, adding that Otis Nicholes had less seniority than either him or Nowlin. Also, in cross-examination, Evanoff indicated that Vahle told him that as far as the Company was concerned, Nowlin could do the job, although, according to Evanoff, there was some concern on the part of the Company regarding Nowlin's age (70 years). Evanoff also related that Vahle remarked that if Evanoff stayed on, if there was any maintenance work that needed to be done and that Nowlin could not do, he would offer that work to Evanoff at the maintenance department's regular rate of pay. According to Evanoff, he refused this offer after ''talking to the union.'' Evanoff testified that when he left the Company on January 20 he had already secured a job at Mobile, where he went to work 2 days after he quit the Company. Evanoff further related that when he left the Company, he told people that he was going to make more money at Mobile than he did working with the Company. Evanoff claimed that he was told this by the people at Mobile before he went to work there. Evanoff also conceded on cross-examination that other employees had given affidavits to the Board, as he had done in June. Evanoff added that not only was he summoned as a witness on behalf of the Board, but a number of his fellow workers at the Company were also summoned.

Donald Smith testified as a business representative for the Union. Smith handled the union organizing drive that resulted in the election of August 6 and ultimate certification by the Board of the Union as the bargaining representative for the production and maintenance employees and truckdrivers at the Company. Smith testified that the certification of the Union actually resulted from an agreement that he helped negotiate and that disposed of all the parties' differences that had arisen both before and after the election of August 26.[15] Smith testified that the Union and the Company commenced contract negotiations shortly after the agreement

[11] Rauth did not testify in the case.

[12] Nowlin's remarks to Evanoff here were included in the Company's hearsay objection, handled later in this decision. It was stipulated that Evanoff gave an affidavit to the Board on June 23, 1988. Evanoff testified that the affidavit was given in a prior unfair labor practice case, in which he had been subpoenaed as a witness on behalf of the Board. Evanoff added that the Company knew this because he had told Bushor ahout these facts.

[13] The letter of recommendation was notarized, signed by H. R. Vahle as executive vice president, and was admitted into evidence. The letter is complimentary and, at the end, it states that Evanoff had approximately 16,000 hours of on-the-job experience under Master Machine Repair Supervisor Sam Nowlin. In this letter, the last name of Nowlin was spelled ''Nowland.'' Throughout the transcript, however, the spelling appears as Nowlin, and Nowlin himself actually signed his name as ''Nowlin.'' Nowlin himself signed several letters of recommendation on behalf of Evanoff and in one such letter, his title appears as ''maintenance supervisor.'' This letter had been typed by Evanoff's wife.

[14] Evanoff's termination report was admitted into evidence. On this report, he was rated in all respects as a ''good'' employee, and the report indicates the Company would make a recommendation ''without reservation.'' The termination report also indicates ''voluntary quit accept better job . . . .'' Under additional comments Evanoff wrote the language ''could not make it after pay cut to make bill meet.''

[15] This agreement was dated October 25, 1988, and was admitted into evidence. The agreement provides that both the Company and the Union would withdraw their challenges filed in the representation cases, for the Company to recognize the Union, and for the Union to refrain from seeking contempt charges against the Company in the pending U.S. district court injunction case. Pursuant to this agreement the Board certified the Union on November 29.

was signed, and it was stipulated that the first negotiating session was on November 10. According to Smith, nothing was stated during the first negotiation session regarding personnel changes, future layoffs, or demotions. Smith testified that the first time he heard about the layoff and demotion regarding Nicholes and Evanoff was on December 9 when he received a telephone call from Union Steward Jim Batronie. Smith indicated that approximately an half hour after the telephone conversation, employees Evanoff and Nicholes, and Alternate Job Steward David Holly arrived at the union hall, and they also discussed the matter, after which Smith indicated that he called Company Vice President H. R. Vahle. According to Smith, Vahle stated that he would have to talk to the Company's attorney before he answered any of his questions. Smith testified that about an hour later, he received a phone call from Attorney Read Cone, and that during this conversation he expressed Smith's concern about the layoff and demotion, making it clear that the Union had not had the opportunity to negotiate the matter. Smith testified that he ultimately filed a charge regarding the matter, and that he had no further contact with the Company regarding the charge, the layoff, or the demotion.[16] In cross-examination, Smith conceded that under the proposed union-contract provision regarding seniority, that a senior employee who returned from an extended illness would have the right to displace a junior employee under normal circumstances. Smith testified that the next negotiating session occurred in January and conceded that the Company attempted to schedule a meeting the week following December 9 but that the Union was unavailable during that week for such a meeting. Smith further indicated that he was scheduled to take a 2-week vacation at the end of December and indicated that the next bargaining session (the second session) occurred on January 26. Smith was asked whether or not the Union proposed any different treatment for Evanoff at the January 26 bargaining session, to which he replied, ''I don't recall . . . I don't believe we did.'' Smith added, however, that the Union intended to maintain Evanoff in his ''current status'' until such time that they could ''sit down and negotiate something different.'' Smith further related that he could not recall whether or not he mentioned Evanoff's bumping of Nicholes or whether the Union ever complained to the Company about Evanoff's rate of pay as a janitor.[17] Smith conceded that he did not ask for any meetings with the Company during the month of December and that the January 26 date for the next negotiating session was an agreed-on date.

David Holly testified as a present employee of the Company, having been hired on June 20, 1986. Holly worked in the Company's shipping and receiving department and held the union position of alternate job steward. Holly knew employees Evanoff and Nowlin and, in his testimony, Holly characterized Nowlin as ''maintenance supervisor.'' Holly was also familiar with Nowlin's leave of absence for illness from December 1987 to December 1988. Holly testified that prior to Nowlin's leave of absence, Nowlin and Evanoff worked in maintenance, and that at the time there was one other maintenance employee who was a janitor (Otis Nicholes). According to Holly, after Nowlin went on sick leave, Evanoff and Joe Walowich worked in the maintenance department. According to Holly, Walowich was hired in December or January 1988 as a ''maintenance helper.'' Holly added that janitor Otis Nicholes did remain in that position during the same period. Holly testified that in February 1988, Walowich and Nicholes were laid off leaving only Evanoff in the maintenance department. Holly testified that he, after the layoffs, spent approximately 4 hours a day as a maintenance helper, adding that this lasted from 4 to 6 weeks. According to Holly, Walowich and Nicholes were subsequently recalled to work, and again the maintenance department consisted of Nicholes as janitor, together with Evanoff and Walowich as maintenance employees. Holly testified that after Nowlin returned to work in Decemher 1988 he was weak, had lost a lot of weight, and was not as fast as he was prior to his illness. According to Holly, in his opinion, Nowlin was unable to perform all of the maintenance duties that Evanoff had been performing during his sick leave absence. Holly testified that he was also present at the November 10 bargaining session, during which no personnel changes were announced or discussed. Holly indicated that he first learned of the layoff of Nicholes and demotion of Evanoff on December 9, when Evanoff explained the same to him. According to Holly, he then went to Nicholes and they both went to Vahle's office, whereupon Vahle explained that due to the lack of sales and the return of Nowlin to work, he was forced to lay off Nicholes and demote Evanoff. Holly testified that he then asked Vahle if Nicholes could work part time, to which Vahle replied that he could not. Holly then related that he asked Vahle if he had contacted Union Representative Smith about the layoffs, to which Vahle responded that he had not, adding that if Smith had any suggestions, to call Vahle. Holly testified that Vahle later that day told him that he had no choice in the matter because Nowlin had returned, and that the Company could not discriminate against Nowlin because of his age, adding that he had passed all of the Company's physicals. According to Holly, sometime during this conversation Evanoff appeared and threatened to call the city of Detroit because he was the only one that had a boiler's license and added that he was calling the Union and was going to the NLRB. Holly related that he then brought up the ''court injunction'' after which he, Evanoff, and Nicholes went to the union hall and talked with Union Representative Smith. Holly testified that after Nicholes was laid off and Evanoff was demoted Nowlin was unable to perform all of the maintenance duties, and that some of these duties were performed by outside contractors and by Jim Acker and Bill Merritt. According to Holly, Acker was the Company's consulting engineer and Merritt was a company employee whose job was that of a ''compounder.'' Holly testified that he had also given an affidavit to the Board and that thereafter Plant Manager Bushor told him that the Company had ''a whole thing of our affidavits upstairs.'' Holly additionally testified that Production Supervisor Dan Dobek ''threatened to sue everyone of us who gave testimony to the N.L.R.B.'' In cross-examination Holly conceded that December was a slow month for the Company and that the Company asked employees to take vacation time

[16] The record indicates that this charge was filed on December l9 (Case 7–CA–28737).

[17] Smith testified that as of May 8, 1989, the Union no longer represented the Company's employees, and at that time, apparently another local (Local 283) became the bargaining agent for the employees in the unit involved. The record does not divulge the reason for this fact or how it came about. Smith did volunteer, however, that it was a jurisdictional matter between the two locals.

during this period in order to avoid layoffs. Holly further indicated that this situation was not discussed at the bargaining table with the Union, and to the best of his knowledge this situation was never brought to the attention of Union Representative Smith.[18] Holly also conceded that he made no alternative suggestions for the treatment of Evanoff (regarding the demotion) and that to the best of his knowledge no such suggestions were made on behalf of the Union.

Samuel M. Nowlin has worked for the Company for 11 years and testified that throughout his employment his job was ''factory maintenance.'' Nowlin indicated that in mid-December 1987 he contracted meningitis and was out of work for 1 year. Nowlin testified that on his return to work in December 1988 he brought letters from three different doctors indicating that he was eligible to go back to work but that the Company additionally sent him to their own doctor for evaluation. Nowlin related that the work he engaged in on his return included climbing ladders, lifting heavy materials, welding work, machinery repair, electrical work, plumbing, and pipefitting. Nowlin testified that when employee Evanoff was employed with the Company, he was his ''helper.'' Nowlin indicated that he would assign work to Evanoff and did have the authority to permit Evanoff to leave his shift early ''to chase parts.'' Nowlin conceded that he did not have the authority to hire, fire, or discipline employees but did have the authority to recommend discipline. According to Nowlin, when Evanoff was hired he knew very little about maintenance and that Nowlin taught Evanoff everything. Nowlin further conceded that he has never laid off or recalled employees, promoted employees, or granted pay increases to employees, but related that he did recommend Evanoff for pay increases. Nowlin also testified that he wore a uniform and was an hourly employee and further that he never attended management meetings. Nowlin testified that since his return to work he has been able to keep up with the maintenance work that needed to be done adding, however, that in maintenance work, ''You never catch up.'' Nowlin indicated that he did interview Evanoff when he applied for employment at the Company and conceded that he thereafter recommended that the Company hire Evanoff. Nowlin identified a letter of recommendation on behalf of Evanoff, indicating that Evanoff's wife typed the document and inserted the language ''maintenance supervisor,'' but Nowlin added that he did supervise Evanoff in that he told Evanoff what he was going to do and how they were going to do it. Nowlin also conceded that he did fill out evaluation forms for Evanoff and signed these forms as ''supervisor,'' because Evanoff worked as his helper, and to that extent, he was supervising Evanoff.[19] Nowlin testified that for the purposes of Evanoff's annual evaluation, he was ''his immediate supervisor.'' Nowlin indicated that he reported directly to Plant Manager Bushor, as did the heads of other departments. Nowlin related that in assigning work to Evanoff, he expected him to complete that work, and Nowlin conceded that the refusal of an employee to follow an assignment was considered a serious offense in the employee handbook. Nowlin testified that he had absolutely nothing to do with Evanoff's demotion and did not know why it occurred, conceding that some of his work did fall behind ''because of one man doing it instead of two.''

Harris R. Vahle testified as the Company's executive vice president for corporate operations. He had worked for the Company for about 11 years and his job at the Company's Detroit facility was to oversee production, shipping, and plant operations, including maintenance. Vahle testified that he did not consider Nowlin as having supervisory authority in the sense that he was a ''foreman'' or a ''member of management.'' Vahle added that Nowlin ''would have only authority by saying that one supervises a specific function or job, much in the same manner that an inspector would supervise the result of a function.'' Vahle testified that regarding salary increases, Plant Manager Bushor would make a recommendation and would present the same to Vahle, and that he in turn would present it to President Rauth (the owner of the Company). Regarding Nowlin's return to work, Vahle testified that the return was governed by the release by Nowlin's doctors, and a certification by the Company's own doctors, that Nowlin was able to go back to work. Vahle added that after all of the medical approvals were received that he gave Nowlin a week of actually working to make sure he could do his job as well as he had performed prior to his illness. According to Vahle, during that week Nowlin ''performed admirably.'' Vahle testified that on concluding that Nowlin could perform his job duties the Company started to make the moves that were necessary for Nowlin's permanent return. According to Vahle, at that time, the Company did not have enough work in the maintenance department for two men and Evanoff was told that he could exercise his seniority rights and bump down within the department or, in effect, he could replace employee Nicholes performing janitorial work. Vahle added that Evanoff did exercise his bumping rights and thus Nicholes was laid off. Vahle testified that, at one point, Evanoff was given the opportunity to be voluntarily laid off to allow Nicholes to continue working but that Evanoff did not wish to do so. Vahle testified that he notified Evanoff of the change on December 9 and, regarding the Union, he notified Holly and Union Steward Jim Batronie, who were both involved in the demotion discussion. Vahle indicated that Nicholes was laid off because he was younger and less senior than either Evanoff or Nowlin. Vahle testified that from a business point of view, the Company had no choice but to allow Evanoff to bump Nicholes, other than to ''create a job to keep . . . [Nicholes] . . . because . . . our current rate of requirements would not allow that to take place.'' Vahle indicated that he attended the collective-bargaining sessions with the Union, and that the Union's proposed contract included a seniority clause similar to that followed by the Company. Vahle added that it was his understanding that seniority considerations would guide the employment of people in that plant, that is, ''whether they were there or they were not there, by reason of seniority.'' Vahle indicated that in his opinion the Union's approach was that strict seniority would be controlling in all cases. Vahle testified that after his decision on December 9 he talked by phone to Union Business Agent Don Smith and, although Smith did not like the fact that any employee was

[18] As of the date of the hearing no contract had been reached by the Union and the Company.

[19] The Company's employee handbook contains a provision to that effect that each employee's supervisor was to perform an annual ''Performance Analysis & Review'' for their employees wherein each employee is rated. The handbook also indicates that such review and rating will be taken into consideration for wage and pay adjustments.

laid off, according to Vahle, Smith made no other recommendation, adding that the Company was not disposed to ''creating a job.'' Vahle described the Company's Detroit facility during December as being in a ''lower state of activity.'' Vahle added that orders had fallen off and were not at their regular level, indicating that December was not usually a busy month for the Company. Vahle testified that when Evanoff replaced Nicholes his rate of pay was 44-cent-per-hour more than Nicholes had received because Evanoff had more years of service. Vahle testified that when there were new installations in the plant that required new wiring and plumbing, outside contractors were always called on to perform such work, because they were familiar with the city codes and were licensed. According to Vahle, a good example of this was the recent installation of a new boiler, but Vahle added that on occasions, the Company's own plant personnel would aid the outside contractor. Vahle testified that on January 20 Evanoff asked for a 2-week leave of absence to try out another job. Vahle related that he denied this request because he did not think it would be fair to Nicholes, especially if Evanoff did not like the new job and returned to the Company. According to Vahle, Evanoff then voluntarily quit the Company. Vahle indicated that the Company attempted to help Evanoff by writing letters of recommendation and that Evanoff had indicated that he had several job offers. Vahle testified that in June the Company had a ''sudden squeeze in allocation of raw materials'' that ended in the layoff of five employees. According to Vahle, these layoffs resulted in ''court proceedings'' and ultimately those employees that had been laid off returned to work. Regarding the decline of work, Vahle testified that the Company peaked at some $14 million worth of volume in 1984 and that thereafter the Company went through a decline from that amount down to the $10 million level that the Company was presently at. According to Vahle, with this decline of production volume, there came also a decline in the maintenance requirements of the Company. Last, Vahle conceded that Evanoff was ''a good man'' and ''[a]lways was.''

C. *Analysis of the Law and Evidence and Initial Conclusions*

1. The supervisory status of Samuel Nowlin

Section 2(11) of the Act defines the term supervisor as follows:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Company in this case seeks to exclude certain portions of Nowlin's testimony on the grounds that it was hearsay. The General Counsel seeks the admittance and usage of such statements alleging that Nowlin was a supervisor within the meaning of the Act. The testimony in controversy is that of employee Evanoff, wherein he indicates that Nowlin told him he was ''maintenance supervisor.'' Additionally, the Company seeks the exclusion of certain remarks made by Nowlin to Evanoff during a telephone conversation several weeks after Evanoff was demoted. Last, the Company seeks to exclude Nowlin's testimony regarding the signing of a letter of recommendation on behalf of Evanoff.[20] At the hearing, I allowed the testimony but provided that the Company could reargue the matter in its posthearing brief or in a motion. In this connection, the Company has filed a motion to strike the testimony and the General Counsel has filed an opposition to the motion to strike. The evidence reflects that Nowlin had no supervisory authority. He could not hire or fire any employee, much less Evanoff, nor could he promote or discipline any employee. Although Nowlin did evaluate Evanoff for several years, the record does not show that the evaluations constituted effective recommendations for promotions, wage increases, or discipline. Although Nowlin did sign his name as supervisor, his actual duties and responsibilities did not support the title. Evanoff was merely an assistant or ''helper,'' assigned to Nowlin in the maintenance department. Further, the evidence reflects that Nowlin was an hourly employee who wore a normal employee uniform, and also that he did not attend management meetings. Accordingly, the Company's motion to strike is granted and those objectionable portions of Nowlin's testimony are struck from the record.

2. The layoff of janitor Nicholes and the demotion of Evanoff

The complaint alleges that about December 9 the Company laid off janitor Otis Nicholes and demoted Evanoff to the position formerly held by Nicholes because of their union activity or sympathies, and also because they gave testimony to the Board in the form of affidavits and they were subpoenaed to testify in a Board case, all in violation of Section 8(a)(4), (3), and (1) of the Act. There is no such evidence in the record to support these allegations regarding Nicholes. The theory, however, of the General Counsel regarding Nicholes centers around Board law that the discharge of one employee to validate or vindicate, or to provide an ''aura of legitimacy'' to the termination of another employee, is violative of the Act.[21]

When discriminatory transfers or discharges are alleged, the initial burden rests with the General Counsel who must, by a preponderance of the evidence, make a prima facie showing sufficient to support the inference that the union and protected activity were a motivating factor in the transfer or discharge. Once this is established, the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the union or protected conduct. *Wright Line*, 251 NLRB l083 (1980); *Wright Line* tests upheld in *NLRB v. Transportation Management Corp.*, 103 U.S. 2469 (1983). I find in this case that the General Counsel failed to make a prima facie showing sufficient to support the inference that union and protected activity were the motivating factor in Nicholes' layoff and Evanoff's tranfer. The litigation and related activity resulting from the

[20] The testimony at issue is found on pp. 21, 60–62, and 71–72 of the transcript.

[21] The General Counsel concedes, in his brief, that Nicholes was not an active union supporter. Nicholes did not testify in the case.

Union's initial organizing drive had occurred and ended in a settlement a considerable amount of time prior to the layoff and demotion. Nowlin did not return to work from his sick leave until approximately a month after the first November negotiating session. Additionally, there is unrebutted evidence in the record that the Company's overall business had declined over the past several years and that December 1988 was a particularly slow period of time for the Company. Finally, Evanoff alone had performed the Company's maintenance duties for several months prior to the return of Nowlin. It is further notable that at least five other employees had given affidavits in the injunction case in the U.S. district court and the record contains no evidence that reflects that Evanoff was more active in support of the Union than any other employee. Evanoff chose, on his own, to initially remain with the Company and bump Nicholes, and this procedure was sanctioned by the Company's rules and by the proposed contract provisions of the Union. I find that the Company's motive for the layoff of Nicholes and the so-called demotion of Evanoff was motivated completely by business and economic necessity, and was in no way influenced by the earlier union and related activity of either Nicholes or Evanoff. I thus find and conclude that the Company did not violate Section 8(a)(3), (4), and (1) of the Act in laying off Nicholes and in placing Evanoff in the job formerly held by Nicholes. Having so found, I further find that the General Counsel's theory regarding the layoff of Nicholes (to validate or vindicate, or provide an ''aura of legitimacy'' to Evanoff's transfer) to be without merit.

3. The alleged constructive discharge of Evanoff

The complaint further alleges that the Company constructively discharged Evanoff or ''caused'' his termination. In order to establish a constructive discharge two elements must be proven by a preponderance of the evidence. First, it must be shown that the burden imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employees' union activities. *Crystal Princeton Refinery Co.*, 222 NLRB 1068 (1976). In this case Evanoff resigned or quit the Company for what he alleged to be economic reasons. Evanoff was reemployed immediately in the job of his choosing. The record is unclear about what if any financial losses were ultimately incurred by Evanoff. No matter why Evanoff left the Company, I find that any burdens that resulted in his ''demotion'' were not imposed by the Company because of any union activity or support on the part of Evanoff. I find that the Company did not constructively discharge Evanoff as alleged in the complaint.

4. The alleged refusal to bargain with the Union

The Union had been certified in November and the first bargaining session had occurred soon thereafter (in November). There were no further bargaining sessions scheduled and the next session was ultimately held in late January. The decision to lay off Nicholes and offer the job to Evanoff was made on December 9, 4 days after the return of Nowlin (and after his trial period had ended). The Company Executive Vice President Vahle almost immediately notified Evanoff and the two union stewards at the Company's facility. At least one of the union stewards soon thereafter notified Union Business Agent Smith. Union Steward Holly and Evanoff himself then met with Smith at the union hall, after which Smith contacted the Company and requested only that Evanoff be kept in his job until the Union had time to look into the matter. [22] Evanoff decided to initially take Nicholes' job and ultimately thereafter decided to leave the Company for a job at Mobile, departing January 20, prior to the next (and second) bargaining session. No conference or negotiating session had been requested by the Union regarding the layoff and demotion prior to Evanoff's departure from the Company. Additionally, several alternatives had been discussed by Vahle with Evanoff and at least one of the two union stewards. Under these facts, and based on the entire record, I cannot find that the Company violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union. Smith, himself, apparently was unable to take any further action regarding the situation because of his own holiday plans, and further because of Evanoff's abrupt and voluntary departure.

On these findings of fact and initial conclusions and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent Employer is an emplover engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. In laying off employee Otis Nicholes on December 9, 1988, and placing employee Douglas Evanoff in the position formerly held by employee Otis Nicholes, the Respondent Employer did not violate Section 8(a)(4), (3), and (1) of the Act.

4. On January 20, 1989, employee Douglas Evanoff voluntarily left his employment with the Respondent Employer, who did not cause the departure and, thus, who did not constructively discharge Douglas Evanoff.

5. In the actions described in paragraphs 3 and 4, above, the Respondent Employer did not refuse to bargain collectively with the Charging Union in violation of Section 8(a)(5) of the Act.

[Recommended Order for dismissal omitted from publication.]

[22] In my opinion, the record is unclear about whether Smith meant that Evanoff should remain as Nowlin's helper or as a maintenance department employee (janitor). In any event, Evanoff was offered and accepted Nicholes' job.

Michael R. Blum, Esq., for the General Counsel.
A. Read Cone III, Esq. and *Eric J. Henning, Esq. (Dean and Fulkerson, P.C.)*, of Birmingham, Michigan, for the Respondent Employer.

SUPPLEMENTAL DECISION

FINDINGS OF FACT

1. Brief history

RUSSELL M. KING JR., Administrative Law Judge. The initial decision in these consolidated cases[1] (the case) was issued by me on September 28, 1990. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a response. By an order issued November 6, 1991, the Board remanded the case back to me for further consideration regarding certain alleged violations of Section 8(a)(3) and (4) of the Act,[2] and the issuance of a supplemental decision. The remand directed that I consider or make explicit credibility resolutions regarding certain matters. I had originally found that the General Counsel did not make a prima facie case of discrimination, found no other violations of the Act, and recommended dismissal of the amended consolidated complaint (the complaint).

In the spring of 1988,[3] the Union commenced an organizational drive of the Respondent's production and maintenance employees at its Detroit, Michigan facility.[4] In mid-June the Union filed a representation petition with the Board requesting an election (Cases 7–RC–18683 and 7–RC–18700). On June 17, the Respondent was notified of the Union's petition. In retaliation, on June 20 the Respondent laid off five employees and transferred a portion of its Detroit operations to its South Carolina facility.[5] As a result of these and other actions by the Respondent, certain unfair labor practice charges were then filed with the Board. In connection with these charges, employee Douglas Evanoff, among others, gave an affidavit to the Board on June 23. On August 26, a Board-conducted election was held at the Detroit facility. Twenty-two employees voted in the election, 11 of which were challenged. Of the 11 remaining votes, 10 were for the Union and 1 was against. On September 2 the Respondent filed objections to the conduct of election, and on September 23 the Regional Director rendered his report on objections. On September 26, and pursuant to a petition for injunctive relief under Section 10(j) of the Act, a hearing was held in the U.S. District Court for the Eastern District of Michigan. The court issued its written findings, conclusions, and order on September 28, wherein the Court, inter alia, found antiunion animus on the part of the Respondent,[6] and ordered the Respondent to reinstate the five laid-off employees, to restore the work ''illegally'' removed to its South Carolina plant, and to rescind its ''illegal'' no-solicitation/no-distribution rule. On or about October 25, the parties settled the representation case (including the objections and pending unfair labor practice charges), and on November 29 the Board certified the Union.

Employee Samuel M. Nowlin was the senior employee in the Respondent's maintenance department. He had worked for the Respondent for 11 years, and at the time of the hearing, his age was 70. Employee Douglas Evanoff was hired to work in the maintenance department in January 1984. For most of the time relevant, the Respondent's maintenance department consisted of Nowlin, Evanoff, and one Otis Nicholes, who was a janitor. Nowlin became ill on or about December 7, 1987, with meningitis, and was on medical leave until December 5 (1988), when he returned conditionally, pending final medical approval. During Nowlin's absence, Evanoff received periodic help from other employees, but for the last 2 months of Nowlin's absence, Evanoff was the only mechanic in the maintenance department. Nowlin's final medical approval from the Respondent came on December 9, when janitor Otis Nicholes was laid off and replaced by Evanoff, at a lower salary. On January 20, Evanoff quit the Respondent for another job, claiming that he could not get by on the reduced janitorial salary.[7] In this case, it is alleged that janitor Nicholes was discriminatorily laid off in violation of Section 8(a)(3) of the Act, to add, as the General Counsel argues, an ''aura of legitimacy'' to the demotion of Evanoff. The demotion of Evanoff is alleged to be a violation of Section 8(a)(3) and (4) of the Act, in that it was because Evanoff supported the Union, and gave testimony to the Board ''in the form of affidavits and/or [was] subpoenaed to testify in Board Cases Nos. 7–CA–28195 and 7–CA–28223.''[8] It is also alleged that in Evanoff's leaving the Respondent, he was constructively discharged by the Respondent by his demotion to the position of janitor (Nicholes' former position), and the resulting reduction in pay, in violation of Section 8(a)(3) and (1) of the Act.[9] Finally, the complaint alleges that the layoff of Nicholes and demotion of Evanoff were accomplished unilaterally by the Respondent and without prior notice to the Union, thus providing the Union with an opportunity to bargain over the layoff and demotion, in violation of Section 8(a)(5) of the

[1] The name of the Charging Union has been changed to reflect the new official name of the International Union.

[2] The National Labor Relations Act, 29 U.S.C. § 151 et seq.

[3] Hereafter, dates in January are in 1989, unless otherwise noted and all other dates are in 1988 unless otherwise noted.

[4] The Respondent, Pillsbury and MSR Trucking, constitute a single integrated business enterprise, and thus a single employer within the meaning of Sec. 2(5) of the Act. In addition to the Detroit, Michigan facility, the Respondent also maintained a similar facility in South Carolina, which is not the subject of these consolidated cases. The Respondent is engaged in the manufacture, sale, and distribution of industrial chemicals, lubricants, and related products.

[5] These facts, among others, were found by a U.S. district court in a 10(j) proceeding in September. This proceeding is mentioned below.

[6] This finding was based on the Respondent's maintenance of an unlawful no-solicitation and no-distribution rule, as set forth in the Respondent's employee handbook. The finding of antiunion animus was made notwithstanding the fact that the Respondent claimed it had never enforced the rule, and that it had been modified in July.

[7] The order issued on September 28 in the 10(j) injunction proceeding was dissolved on February 10.

[8] The affidavit given by Evanoff was apparently also used in support of the Board's 10(j) injunction case. Evanoff had signed a union authorization card, but there is a controversy here as to whether the Respondent knew that Evanoff supported the Union. This controversy will be resolved later in this decision. As to the union sentiments of janitor Nicholes, such are unknown, as Nicholes did not testify in the case. In his posthearing brief, the General Counsel concedes that Nicholes was ''not particularly active'' regarding the Union. Whether Nicholes supported the Union is another matter, the resolution of which is unnecessary to the final outcome of the case.

[9] The Respondent denies that Evanoff was demoted, and claims that he actually exercised his ''bumping'' rights against Nicholes, which then forced the layoff of Nicholes.

Act.[10] The Respondent denies any wrongdoing in the layoff of Nicholes, the demotion and termination of Evanoff, and alleges that on Nowlin's return from his illness, the layoff and demotion were accomplished solely for economic reasons.

2. The supervisory status of Nowlin and his excluded remarks to Evanoff

Section 2(11) of the Act defines the term supervisor as follows:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

I had earlier found that Nowlin was not a statutory supervisor. As far as Evanoff was concerned, I was wrong. Nowlin was not an ordinary or traditional supervisor, and during his testimony he appeared in a soiled maintenance uniform, with hands of one who had worked with oily machines and such for years. He did not have the authority to hire, fire, or discipline employees,[11] he always wore a uniform, was an hourly employee, and never attended management meetings. Nowlin was also not consulted when Evanoff was demoted to the position of janitor in the maintenance department. Nowlin, himself, was somewhat uncertain of his position regarding Evanoff, testifying that ''I supervised Doug, my helper, on what we was going to do.''

In addition to the above, and regarding the status of Nowlin and the relationship between Nowlin and Evanoff,[12] the record (including the testimony and exhibits) reflects the following:

1. Plant Manager Bushor asked Nowlin to interview Evanoff for employment, which he did, and effectively recommended that Evanoff be hired.

2. Nowlin performed Evanoff's annual evaluations as his ''supervisor,'' which resulted in pay increases.[13]

3. On January 9, 1989, the Respondent's executive vice president for corporate operations, Harris Vahle, wrote a letter of recommendation on behalf of Evanoff indicating that he had 16,000 hours of job experience ''under a master machine repair supervisor, Sam Nowland.''

4. On January 16, 1989, Nowlin himself wrote a letter of recommendation regarding Evanoff and signed the same as ''Maintenance Supervisor.''

5. Nowlin himself testified that he did have the authority to recommend discipline.[14]

6. Nowlin testified that he would assign work to Evanoff as his ''helper,'' and did have the authority to permit Evanoff to leave his shift early ''to chase parts.''[15]

7. Nowlin testified that he did successfully recommend pay increases for Evanoff.[16]

8. Nowlin testified that for the purposes of Evanoff's annual evaluation, that he was ''his immediate supervisor.''

9. Nowlin testified that he reported directly to Plant Manager Bushor, as did the heads of other departments.

10. Nowlin testified that in assigning work to Evanoff, he expected him to complete that work, indicating that the refusal of an employee to follow an assignment was considered a serious offense in the employee handbook.[17]

11. Employee David Holly had worked for the Respondent since June 20, 1986, and in his testimony he characterized Nowlin as ''maintenance supervisor.''[18]

Under Board law, one may be a supervisor without meeting all the criteria of Section 2(11) of the Act, that is, the enumerated functions of a supervisor are listed ''disjunctively'' in Section 2(11) of the Act, but which requires that

[10] This allegation is not the subject of the remand.

[11] By his own testimony, Nowlin did have the authority to recommend discipline, but there is no evidence that he ever actually made such a recommendation.

[12] I basically credit the testimony of both in this case, although there are some minor conflicts.

[13] It was conceded by all in this case that Evanoff was a good employee. His annual evaluations were ''excellent.''

[14] As indicated earlier, there is no testimony or evidence in the case that Nowlin ever made such recommendations, or that the same would have been followed if so made.

[15] ''To chase parts'' apparently meant to go out and purchase parts on the local economy, which were not kept in stock or were missing from stock. The cost of these parts could be no more than $50.

[16] These pay increases were recommended by Nowlin in his annual evaluations of Evanoff on August 15, 1986 (50 cents per hour), and on September 1, 1987 ($1 per hour).

[17] The Respondent's employee handbook contains a provision to the effect that each employee's ''supervisor'' was to perform an annual ''Performance Analysis & Review'' for their employees wherein each employee is rated. The handbook also indicates that such reviews and ratings would be taken into consideration for wage and pay adjustments.

[18] As with Nowlin and Evanoff, I also credit the testimony of employee David Holly in this case. The testimony of Holly and Evanoff conflicted with the testimony of Nowlin and Executive Vice President Vahle in respect to Nowlin's working ability after he returned from his year long leave of absence due to illness. Nowlin inferred in his testimony that on his return he was up to par, and Vahle testified that on Nowlin's return, and during his first week back (a trial week) Nowlin ''performed admirably.'' Holly testified that on Nowlin's return, he was weak, had lost a lot of weight, and was not as fast as he was prior to his illness. Evanoff testified that on Nowlin's return, he was slow and very weak, and on occasion he (Evanoff) would finally finish jobs that Nowlin had started. Although Nowlin may well have performed what Vahle considered to be ''admirably,'' as Holly and Evanoff indicated I find that Nowlin was in fact weak and slower on his return, and that Nowlin's inference to the contrary involved, to some extent, his pride. Nowlin did concede that after he lost Evanoff, his work did fall behind, which also somewhat conflicts with Vahle's testimony that during that period, only one person doing maintenance work was required because of a drop in business. Vahle's contention that there was a drop in business in December is supported by other testimony in the case. I find, however, that there was no resulting drop of work in the maintenance department as Vahle would infer from his testimony, and to this extent, I discredit Vahle's testimony.

a supervisor must have authority to use independent judgment in performing such supervisory function(s) in the interest of management. From the creditable evidence and testimony in this case, I now find that in the case of Evanoff, Nowlin had the authority to assign work to him and control his work through the use of his own independent judgment, and that Nowlin also had the authority to effectively recommend, by using his own independent judgment, such assignment of work, together with pay increases and the possible discipline of Evanoff. Nowlin's control over Evanoff was not only derived from his superior experience in maintenance, but in the use of his independent judgment to direct Evanoff in his daily work assignments, notwithstanding the fact that Nowlin, himself, often participated in accomplishing Evanoff's work assignments. As indicated, I now find that Nowlin was a statutory supervisor over Evanoff in accordance with Section 2(11) of the Act.

Evanoff testified that several weeks after his December 9 demotion he had a telephone conversation with Nowlin, wherein Nowlin remarked that he had learned that Bushor and Vahle had seen affidavits that he had given to the Board and that Vahle and Bushor had told Nowlin that he was demoted because he also voted for the Union. The Respondent objected to this testimony on the grounds of hearsay, contending that Nowlin was not a supervisor under the Act. I delayed ruling on the motion and chose to handle the same in my initial decision, wherein I found that Nowlin was not a supervisor, thus granting the motion and excluding the testimony. Now having found that Nowlin is a statutory supervisor, I withdraw that ruling and admit the testimony of Evanoff regarding what Nowlin told him over the phone after his demotion. During the hearing, Nowlin and Vahle curiously were not asked about the phone conversation or Nowlin's remarks therein, and of course Plant Manager Bushor did not testify in the case. Thus, this credited testimony of Evanoff regarding Nowlin's remarks during the phone conversation is also unrefuted in the record.

3. Evanoff's unrefuted testimony of Respondent's bias against him

The election occurred on August 6 and Evanoff testified that he voted in the election, and that 15 minutes prior thereto he had a conversation with the Respondent's president, Robert Rauth, who asked him, ''[I]f I knew what I was doing before I went in there . . . [to vote].'' According to Evanoff, after the election and some time in September, Rauth asked him, ''What happened to you Doug?'' Evanoff testified that he replied to Rauth that he voted the only ''No'' vote, to which Rauth replied that he did not because the sole ''no'' vote was that of one Bruce Neighbor (who did not testify). Evanoff then stated to Rauth that Rauth did not know that for sure, as the election was a secret-ballot election, and Rauth replied to Evanoff that he did not believe him.

Evanoff was demoted December 9, and testified that some time after the demotion he asked Executive Vice President Harris Vahle why the Respondent had demoted him, to which Vahle responded, ''[H]e didn't like liars.'' Evanoff testified that on the day of his demotion, he told Vahle that he ''was going down to the NLRB to give an affidavit'' regarding his demotion, to which Vahle replied that ''he would not do that if I was him.'' In his testimony, employee David Holly confirmed that Evanoff mentioned he was going to the NLRB. Although Vahle testified in the case, he was never asked about any of these remarks to Evanoff.[19] I find that the Respondent knew of Evanoff's union support, and considered that he had lied when he told Rauth that his was the only ''no'' vote at the election. I find that the Respondent wanted to retaliate against Evanoff because of his union support, but could not disguise the fact that Evanoff was a good employee. Thus, the Respondent devised a plan to in effect punish Evanoff for what the Respondent considered to be his misdeeds, and that punishment was his demotion to the position of janitor, with the resulting displacement and layoff of janitor Nicholes. Part of the plan was the use of the Respondent's declining December sales to falsely maintain that there was also not enough work in the maintenance department for two men, thus extending bumping rights to Evanoff over janitor Nicholes.[20] The Respondent also reasoned that this plan would afford a good cover as far as the Union was concerned, as during the ongoing contractual negotiations, the Union had stressed a strict seniority system where layoffs were concerned. In describing the Respondent's slowdown in December, Vahle, in his testimony, used somewhat mystical terms such as ''flow-volume'' and ''current rate of requirements.''

Concluding analysis

After a complete rereading of the record (including the testimony and evidence), and after carefully considering the points made and the language contained in the Board's remand here, I now find and conclude that the Board's layoff of janitor Otis Nicholes and the demotion of maintenance employee Evanoff were violative of Section 8(a)(3) and (1) of the Act, and further, in the case of Evanoff, also violative of Section 8(a)(4) of the Act. From the findings of the United States district court in the Board's 10(j) proceeding, together with the employee handbook, the unfair labor practices committed during the union organizational campaign, and the unrefuted antiunion remarks made by the Respondent's management (including Rauth, Bushor, Vahle, and Dobek), I find that the Respondent strongly opposed any

[19] Regarding ''affidavits,'' Evanoff had testified regarding a telephone conversation he had had with Nowlin several weeks after he had been demoted. This was the conversation wherein Evanoff indicated that Nowlin told him that Vahle and Bushor had stated to him that Evanoff was demoted because he voted for the Union. In that conversation, Evanoff indicated that Nowlin also mentioned affidavits, informing Evanoff that Bushor and Vahle had seen affidavits that Evanoff had given to the Board. Neither Vahle nor Nowlin was asked about this remark during their testimony. Evanoff testified that he himself told Plant Manager Bushor that he gave an affidavit to the Board, and it was stipulated in the case that this affidavit was given to the Board on June 23. The affidavit was given in support of charges of unfair labor practices which had been filed during the union election campaign. Employee David Holly had also given an affidavit to the Board and testified that at some point, Plant Manager Bushor had told him that the Respondent had ''a whole thing of our affidavits upstairs.''

[20] In his testimony, employee Holly did concede that December was a slow month for the Respondent, who asked employees to take vacation time during this period in order to avoid layoffs. Holly, however, was not in the maintenance department, but in the shipping and receiving department, which would be directly and quickly affected as a result of a slowdown in sales.

union organization or representation and outwardly displayed strong antiunion animus.[21] Constant reference was made to employee affidavits given to the Board and to the fact that Respondent had them all. The Respondent zeroed in on employee Evanoff because, contrary to the knowledge of the Respondent, Evanoff lied when he maintained that his vote was the only ''no'' vote against the Union in the election on August 26. As indicated earlier, the Respondent had a particular problem with disciplining Evanoff for his union support, because Evanoff otherwise was a competent employee. Thus, the Respondent devised a plan or scheme whereby they could get back at Evanoff by laying off janitor Nichols and demoting Evanoff to his janitorial position. This was done under the guise that the December slowdown in business resulted in the reduction of maintenance work, which the Respondent maintained that Nowlin could handle alone.[22] Janitor Nichols' layoff was occasioned not by his union support, but I find it was accomplished to validate or vindicate, or to provide an aura of legitimacy to the demotion of Evanoff, under the guise of affording him ''bumping'' rights. Under Board law, such a layoff (or discharge) is also a violation of Section 8(a)(3) and (1) of the Act, and I find such was the case here. I also find that Evanoff's demotion caused him to search for and obtain what he thought was a higher-paying job and quit the Respondent on January 20.[23] Thus, I now find that the General Counsel presented a prima facie case sufficient to support the inference that Evanoff's union support, including his Board affidavit, was a motivating factor in his demotion, ultimately causing his leaving the Respondent. I further find and conclude that the Respondent failed to demonstrate that the demotion of Evanoff would have taken place notwithstanding his union support, as required in the Board's decision in *Wright Line*.[24]

On the foregoing findings of fact, and on the entire record, I now find and make the following

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Pillsbury Chemical & Oil Company and MSR Trucking Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union, Local 299, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. In laying off employee Otis Nichols on December 9, 1988, and the placing of employee Douglas Evanoff in the position formerly held by employee Nichols, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. In the actions described in paragraph 3, above, and regarding Douglas Evanoff, the Respondent violated Section 8(a)(4) and (1) of the Act.

5. On January 20, 1989, the Respondent constructively discharged employee Douglas Evanoff in violation of Section 8(a)(3) and (1) of the Act.

6. In the unlawful and discriminatory actions above described regarding employees Otis Nichols and Douglas Evanoff, the Respondent did not refuse to bargain collectively with the Charging Union in violation of Section 8(a)(5) of the Act.

THE AMENDED REMEDY

Having now found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully laid off its employee Otis Nichols, and unlawfully demoted employee Douglas Evanoff, and thus unlawfully causing his departure from his employment with the Respondent, I shall recommend that the Respondent be ordered to offer Otis Nichols immediate and full reinstatement to his position as a janitor in the Respondent's maintenance department, and to also offer Douglas Evanoff immediate and full reinstatement to his former position in the Respondent's maintenance department before he was demoted or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I shall further recommend that the Respondent be ordered to make Otis Nichols and Douglas Evanoff whole for any loss of earnings they may have suffered as a result of the discrimination against them, and that the Respondent remove from its records any reference to the layoff of Otis Nichols on December 9, 1988, or to the demotion of Douglas Evanoff on December 9, 1988, and to his departure on or about January 20, 1989, and notify them in writing that the Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co*., 90 NLRB 189 (1950), with interest as described in *New Horizons for the Retarded*, 293 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

---

[21] The Respondent's handbook referred to by the U.S. district court, under ''Employee Relations,'' recites that ''Pillsbury's management is convinced that you prefer to deal directly with management rather than through a union.''

[22] It should also be noted that the testimony of Holly reveals that after Evanoff was demoted, Nowlin was aided by the help of outside contractors, Consulting Engineer Jim Acker, and employee (compounder) Bill Meritt, who worked on maintenance with Nowlin on an occasional and part-time basis.

[23] Evanoff had asked for a leave of absence to try out the job, but this request was denied, contrary to the past practice of the Respondent.

[24] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).